FOR ARGUMENT
MOTION FILED
FEB 19 2003

Supreme Court, U.S.
FILED
FEB 18 2003

NO. 02-102

IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

vs.

STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF OF THE CENTER FOR MARRIAGE LAW IN SUPPORT OF RESPONDENT

Vincent P. McCarthy
Counsel of Record
Center for Marriage Law
P.O. Box 1839
New Milford, CT 06776
(860) 355-1902

Joshua K. Baker
Marriage Law Project
Columbus School of Law
The Catholic University of America
3600 John McCormack Rd.
Washington, DC 20064
(202) 319-6755

Lynn D. Wardle
William C. Duncan
Brigham Young University
518 J. Reuben Clark Law School
Provo, UT 84602
(801) 422-2617

Attorneys for Amicus Curiae

BEST AVAILABLE COPY

NO. 02-102

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

vs.

STATE OF TEXAS,

Respondent.

MOTION OF THE CENTER FOR MARRIAGE LAW FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT

The Center for Marriage Law would like permission from the Court to file the attached amicus brief in the above matter. The Center for Marriage Law is a non-profit 501(c)3 corporation specializing in issues related to one man/one woman marriage seeking to uphold one man/one woman marriage. Counsel for the Center for Marriage Law, Vincent P. McCarthy, sought permission from LAMBDA to file this brief but was denied because said request was made on stationery for the American Center for Law and Justice. The Center for Marriage Law has no relationship to the American Center for Law and Justice and new stationery for the Center for Marriage Law had not yet arrived. Despite counsel for LAMBDA'S belief that this brief is duplicative of another brief filed by the American Center for Law and Justice in this matter the Center for

Marriage Law assures this court that no part of the brief was written by anyone employed by the American Center for Law and Justice.

Respectfully submitted,

Lynn D. Wardle
William C. Duncan
Brigham Young University
518 J. Reuben Clark Law School
Provo, UT 84602
(801) 422-2617

VINCENT P. McCARTHY
Counsel of Record
CENTER FOR MARRIAGE LAW, INC.
8 South Main Street
P. O. Box 1839
New Milford, CT 06776
(860) 210-1182

Joshua K. Baker
Marriage Law Project
Columbus School of Law
The Catholic University of America
3600 John McCormack Rd.
Washington, DC 20064
(202) 319-6755

Attorneys for Amici Curiae

February 14, 2003

QUESTIONS PRESENTED

1. Whether this Court should dismiss the writ of certiorari as improvidently granted in light of the extreme paucity of the record?

2. Whether the Due Process Clause of the Fourteenth Amendment renders facially unconstitutional a state law prohibiting extramarital sexual activity, specifically same-sex sodomy?

3. Whether the Equal Protection Clause of the Fourteenth Amendment renders facially unconstitutional a state statute prohibiting same-sex sodomy?

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

ARGUMENT 1

I. THE RECORD IN THIS CASE IS INSUFFICIENT TO SUPPORT A DECISION ON THE MERITS. 2

II. THE COURT SHOULD AVOID ANY HOLDING WHICH WOULD UNDERMINE MANY STATE LAWS PROTECTING MARRIAGE AND THE TRADITIONAL FAMILY STRUCTURE. 3

A. Marriage is the primary institution for regulating sexual behavior. 5

B. This Court has extended constitutional significance to the institution of marriage as the primary institution to foster responsible sexual behavior 7

i. Marriage is the fundamental element of American democratic society. 9

ii. Marriage is the optimal setting for procreation and child rearing. 10

C. Texas law endorses and affirmatively prefers sexual relations within marriage 11

D. Section 21.06 is part of an incremental system channeling sexual activity into marriage and minimizing sexual activity outside of marriage.. 14

E. In failing to distinguish between married and unmarried couples, Petitioners would have this court require equal legal recognition of same-sex couples and married couples. 18

F. Numerous state and federal laws could be impacted by the Court's decision in this case, removing an important public policy debate from the political process 19

G. Deference to the Texas Legislature would preserve the important principle of federalism in family laws 21

III. THE APPROPRIATE CONSTITUTIONAL RESPONSE TO THIS CASE IS FOR THIS COURT TO DEFER TO THE TEXAS LEGISLATURE. 25

A. Deferring to the Texas Legislature would not conflict with this Court's holding in Romer v. Evans 25

B. Deference to the Texas Legislature Recognizes the Importance of Open Public Debate in Democratic Society 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947) 1

Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945) 1

Atkins v. Virginia, 536 U.S. 304 (2002) 29

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971)..... 19

Baker v. State, 744 A.2d 864 (Vt. 1999) 19

Baker v. Wade, 553 F. Supp. 1121, 1N.D. Tex. 1982)..... 27

Ballard v. United States, 329 U.S. 187 (1946)..... 9

Barber v. Barber, 62 U.S. (21 How.) 582 (1859) 21

Ellis v. Dixon, 349 U.S. 458 (1955) 1

Griswold v. Connecticut, 381 U.S. 479 (1965). 8

International Brotherhood of Teamsters v. Denver Milk Producers, Inc., 334 U.S. 809 (1948) 1

Jackman v. Rosenbaum Co., 260 U.S. 22 (1922)..... 28

Lawrence v. Texas, 41 S.W.2d 349 (Tex. Ct. App. 2001)..... 2

Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982) 21

Loving v. Virginia, 388 U.S. 1 (1967) 7

Maynard v. Hill, 125 U.S. 190 (1888),..... 27

Meister v. Moore, 96 U.S. 76, 81 (1877)..... 7

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 7

Moore v. Sims, 442 U.S. 415 (1979) 21

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) 8

New State Ice v. Liebmann, 285 U.S. 262 (1932) 24

Nguyen v. I.N.S., 533 U.S. 53 (2001) 9, 11, 28

Pennoyer v. Neff, 95 U.S. 714 (1878) 23

Poe v. Ullman, 367 U.S. 497 (1961) 16, 17

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) 16

Rescue Army v. Municipal Court, 331 U.S. 549 (1947)..... 1

Reynolds v. United States, 98 U.S. 145 (1878) 7, 11

Romer v. *Evans*, 517 U.S. 620 (1996)..... 25, 26, 28

Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974)..... 19

Sosna v. Iowa, 419 U.S. 393 (1975)..... 21, 23

State v. Perez, 948 S.W.2d 362 (Tex. Crim. App. 1997)..... 2

Troxel v. Granville, 530 U.S. 57 (1996)..... 3

Turner v. Safley, 482 U.S. 78 (1987)..... 7

U.S. v. Salerno, 481 U.S. 739 (1987) 2

United States v. Morrison, 529 U.S. 598 (2000)..... 23

United States v. Virginia, 518 U.S. 515 (1996)..... 9

Washington v. Glucksberg 521 U.S. 702 (1997)..... 29

Zablocki v. Redhail, 434 U.S. 374 (1978) 7, 9

Statutes

10 Ok. Stat. §7503-1.1; Wis. Stat. § 48.82 (2002) 20

13 Del. Code § 951 (2002); 20

18-A Maine Rev. Stat. § 9-301 (2002)..... 20

26 U.S.C. § 6013 (2002)..... 20

42 U.S.C. § 710 (2002)..... 20
750 Ill. Comp. Stat. § 50/2 (2002)..... 20
A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital in The Papers of Thomas Jefferson, Vol. 2, 1777 to 18 June 1779, at 492, 493, 497 note † (Julian P. Boyd ed., Princeton Univ. Press 1950) 17
Acts 1973, 63rd Leg., p. 1596, ch. 577, § 1 11
Ala. Code § 30-1-19 (2002)..... 19
Ala. Stat. § 26-10A-27 (2002)..... 20
Ala. Stat. § 26-10A-5 (2002)..... 20
Ariz. Rev. Stat. § 8-103 (2002); 20
Ark. Code Ann. § 9-11-107 (2002) 19
Ark. Code Ann. § 9-11-208 (2002) 19
Cal. Fam. Code App. § 227.10 (2002) 20
Colo. Rev. Stat. § 14-2-104 (2002) 19
Del. Code Ann. tit. 13, § 101 (2001)..... 19
Fl. Stat. § 63.042 (2002);..... 20
Ga. Code 19-3-3.1 (2002)..... 19
Ga. St. § 19-8-3(c) (2002) 20
Haw. Rev. Stat. § 572-3 (1999)..... 19
Ia. St. 595.2 (2002)..... 19
Ia. Stat. § 600.4 (2002)..... 20
Iowa. Code § 600.4 (2002)..... 20
Kan. Stat. § 59-2113 (2002) 20
Kan. Stat. Ann. § 23-101 (1999) 19
Ky. Rev. Stat. Ann. § 402.045 (Michie 2002)..... 19

Ky. Rev. Stat. Ann. §§ 402.040 (Michie 2002)..... 19
Minn. Stat. Ann. § 517.01 (2002)..... 19
Miss. Code Ann. § 93-1-1 (2002)..... 19
Mo. Rev. Stat. § 451.022 (West 2002)..... 19
Mont. Code Ann. § 40-1-401 (2002)..... 19
Mt. Code Ann. § 42-1-106 (2002)..... 20
Mt. Code Ann. § 42-4-302 (2002)..... 20
N.C. Stat. § 48-4-101 (2002);..... 20
N.D. Cent. Code § 14-03-01 (2000)..... 19
N.M. Stat. § 32A-5-32 (2002) 20
Pa. Consol. Stat.Ann. § 1704 (West 2000)..... 19
Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997)..... 20, 21
S.D. Cod. Laws § 25-1-1 (2000) 19
Tenn. Code Ann. § 36-3-113 (2002) 19
Tex. Civ. Prac. & Rem. Code Ann. § 71.004 (West 2002). 13
Tex. Code Crim. P. Ann. art. 38.03 (West 2002)..... 2
Tex. Educ. Code Ann. § 28.004 (West 2002) 14
Tex. Educ. Code Ann. § 51.919 (West 2002) 15
Tex. Fam. Code Ann. § 2.001(a) (West 2002) 11, 27
Tex. Fam. Code Ann. § 2.501(b) (West 2002)..... 12, 13
Tex. Fam. Code Ann. § 3.003 (West 2002) 12, 13
Tex. Fam. Code Ann. § 3.401(5) (West 2002)..... 13
Tex. Fam. Code Ann. § 7.001 (West 2002) 12
Tex. Gov't Code Ann. § 615.073 (West 2002) 13
Tex. Gov't Code Ann. § 810.001(h) (West 2002)..... 14

Tex. Health & Safety Code Ann. § 163.001 (West 2002)... 15
Tex. Health & Safety Code Ann. §85.007(b)(1) (West 2002) 15
Tex. Health and Safety Code Ann. § 711.002 (West 2002) 12
Tex. Ins. Code Ann. § 1551.004 (West 2002)..... 13
Tex. Ins. Code Ann. § 1575.003 (West 2002)..... 13
Tex. Lab. Code Ann. §§ 408.182-.183 (West 2002)..... 13
Tex. Penal Code Ann. § 21.01(1) (West 2002). 15
Tex. Penal Code Ann. § 21.06 (West 2002)..... passim
Tex. Prob. Code Ann. § 45 (West 2002) 13
Tex. Rev. Civ. Stat. Ann. art. 6132a-1 (West 2002) 14
Tex. Rev. Civ. Stat. Ann. art. 6132b-9.02 (West 2002)..... 14
Tex. Rev. Civ. Stat. Ann. art. 6132b-9.03 (West 2002)..... 14
Tex. Rev. Civ. Stat. Ann. art. 6132b-9.05 (West 2002)..... 14
Tex. Rev. Civ. Stat. Ann. art. 6243a-1 (West 2002) 13
Tex. Rev. Civ. Stat. Ann. art. 6243e (West 2002)..... 13
Texas Fam. Code Ann. § 2.501(a) (West 2002)..... 12
Utah Code Ann. § 30-1-4 (2000)..... 19
Vt. Stat. Ann. tit. 15A, § 4-101 (2002)..... 20
Vt. Stat. Ann., tit. 15, § 1201, et seq. (2002)..... 3
Vt. Stat. Ann., tit. 15, § 8 (2002)..... 3
W.Va. Code § 48-2-603 (2002)..... 19

Other Authorities

Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787 (1995)..... 21

Bert N. Adams, *The Family: A Sociological Interpretation* 188-89 (1986)..... 4
Brief of Plaintiffs-Appellants, *Goodridge v. Dept. of Public Health*, at 61, No. SJC-08860 (Mass.) 18
Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests* 81 Mich. L. Rev. 463 (1983) 9, 10
Charles Louis de Secondat (Baron de Montesquieu), The Spirit of the Laws, Book XIX, ch. 14, and at Book XIX, ch. 5 (T. Nugent trans., 1902)..... 24
Complaint, *Lewis v. Harris* at para. 66-67, No. 15-03, Mercer Co. Super. Ct. (N.J.)..... 18
Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. Rev. 737, 767 n. 142 (2000) 27
Defense of Marriage Act, Rep. 104-664, Comm. on Judiciary, 104th Cong., 2d Sess., July 9, 1996, at 10..... 21
Defense of Marriage Act, Rep. 104-664, Comm. on Judiciary, 104th Cong., 2d Sess., July 9, 1996, at 13-14. 10
Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813, 813 (2001) 27
Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998)..... 23
John Locke, *Two Treatises of Government* 183 (Cambridge Univ. Press 1988) (1690)..... 6
Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089 (2002).... 4
Lawrence Stone & Jeanne Stone, *An Open Elite? England 1540-1880* (1984) 6

Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. L. & Pub. Pol'y 771 (2001) 5

Mary Ann Glendon, *The Transformation of Family Law* (1989) 6

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 34, *Morrison v. Sadler*, Docket # 49D13-0211-PL-001946, Marion Super. Ct. (Ind.)..... 19

Plato, *The Laws of Plato* 108-109, 161 (Thomas L. Pangle trans., University of Chicago Press 1980) 5

Random House Webster's College Dictionary 370 (1991). 15

Richard A. Posner, Sex and Reason 4, 292 (1992) 27

Richard D. Mohr, Gays/Justice: A Study of Ethics, Society, and Law 51 (1988) 27

Sex in the West, The New Republic, July 8, 1985, at 25, 32. 6

Susan Price-Livingston, *Connecticut Laws Involving Marital Status*, OLR Research Report #2001-R-0606 (Feb. 5, 2002) (Conn.) 20

Susan Treggiari, *Roman Marriage: Justi Coniuges From the Time of Cicero to the Time of Ulpian* 5-11 (1991)..... 6

The Baptist Faith and Message (revised by the Southern Baptist Convention, June 10, 1998) <http://www.sbcnet.org/bfm18.htm>. 7

The Federalist (James Madison) (Clinton Rossiter ed., 1961) 22, 23

Will Durant & Ariel Durant, *The Lessons of History* 35 - 36 (1968) 5

Will Durant, *The Reformation: A History of European Civilization from Wyclif to Calvin: 1300-1564* at 303 (1957) 6

William C. Duncan, *The Legacy of* Romer v. Evans*–So Far* 10 WIDENER J. PUB. L. 161 (2001)..... 26

William J. Goode, *World Revolution and Family Patterns* 38 (1963) 6

Constitutional Provisions

Alaska Const. art. I, § 25 19

Haw. Const. art. I, § 23..... 19

Neb. Const. art. I, § 29 19

Nev. Question 2 (approved Nov. 5, 2002) 19

INTEREST OF AMICUS CURIAE

The Center for Marriage Law is an organization established to preserve and defend the male-female institution of marriage through public policy research, litigation, and educational efforts regarding the central role of marriage in American society.[1] The Center is deeply anxious that nothing in this Court's decision establish precedent that would weaken the legal status of marriage and the family.

SUMMARY OF ARGUMENT

What petitioners in this case seek is to establish a precedent that would undermine laws that recognize and protect the unique, exclusive social value and benefits of marriage. Much more is at stake than a mere sodomy law. The petitioners seek to establish a constitutional principle that will profoundly influence public policies concerning a host of family related issues.

Establishing a principle such as petitioners seek based on the paucity of facts in this case is extremely unwise. Further, this Court should be cautious about any decision that would affect the unique constitutional status of marriage and the laws and policies of many jurisdictions. A more appropriate response to petitioners request is to defer to the democratic process which would protect the crucial constitutional interests at stake.

ARGUMENT

---

[1] No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. Written consent of Respondents to the filing of this brief has been filed with the Clerk of this Court. Petitioners denied consent as indicated in the attached motion.

I. THE RECORD IN THIS CASE IS INSUFFICIENT TO SUPPORT A DECISION ON THE MERITS.

This case presents an inapt vehicle for the Court's judgment on the controversial public policy questions raised by Petitioners, providing the Court with virtually no factual record upon which to rest a decision. As this Court has often held, absent a sufficient record, the Court should dismiss the writ of certiorari as improvidently granted. *Ellis v. Dixon*, 349 U.S. 458, 464 (1955) *citing International Brotherhood of Teamsters v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Such dismissal is appropriate in this case.

Petitioners' argument is premised heavily on the proposition that the Petitioners were prosecuted for engaging in "private, consensual sexual relations." *See, e.g.*, Pet. Brief at 11-18. The evidentiary record, however, establishes only that the Petitioners were adult males discovered engaging in "deviate sexual conduct, namely, anal sex," in violation of Texas Penal Code § 21.06 (hereinafter "section 21.06"). Pet. App. 129a. In seeking to bring an "as applied" challenge, Petitioners presented no evidence (a) that the sexual acts were consensual, (b) that either or both Petitioners had capacity to consent (c) that the acts were private, or (d) that they were noncommercial. The record is devoid of any evidence which would give this Court a basis to decide the substantive issues in this case.[2]

---

[2] Allegations contained in Petitioners' motion to quash were not supported by evidence and do not satisfy the Petitioners' evidentiary burden. "The proponent of a motion to quash the indictment has the burden of proof and may offer proof of the allegations in the motion to quash." *State v. Perez*, 948 S.W.2d 362, 364 (Tex. Crim. App. 1997).

Petitioners attempt to paper over this procedural defect by shifting the burden of proof to the Respondents. Pet. Brief at 3. The State's duty in prosecution, however, is only to prove the elements of the crime charged. Tex. Code Crim. P. Ann. art. 38.03 (West 2002). Additional facts cannot be inferred from the State's failure to prove *non-elements*. Because section 21.06 applies to all deviant sexual intercourse between persons of the same sex, proof that the Petitioners' conduct was non-consensual, commercial or public would have been superfluous to the state's prosecution under Section 21.06. There is simply no evidence in the record to support Petitioners' challenge to the constitutionality of section 21.06 *as applied to private, consensual, non-commercial sexual activity.*

In the absence of a sufficient record to support Petitioners' challenge to Section 21.06, this case must be viewed, at best, as a facial challenge to the statute. *Lawrence v. Texas*, 41 S.W.2d 349, 350 (Tex. Ct. App. 2001) ("[T]he facts and circumstances of the offense are not in the record. . . . Thus, the narrow issue presented here is whether Section 21.06 is facially constitutional."). Pursuant to this Court's ruling in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987), a party bringing a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *See also Troxel v. Granville*, 530 U.S. 57, 85 (Stevens, J., dissenting) ("I believe that a facial challenge should fail whenever a statute has 'a "plainly legitimate sweep."'"). Petitioners do not dispute that the statute would be valid as enforced against public or commercial sexual activity. Pet. Brief at 6, 39-40. Having conceded that the Act would be valid under some circumstances, Petitioners' facial challenge must fail.

II. THE COURT SHOULD AVOID ANY HOLDING WHICH WOULD UNDERMINE MANY STATE LAWS PROTECTING

MARRIAGE AND THE TRADITIONAL FAMILY STRUCTURE.

Without explicitly challenging the Texas marriage law, Petitioners and their amici have advanced arguments which could significantly undermine state laws regulating marriage. As noted below, every state, with the partial and recent exception of Vermont,[3] elevates marital relationships over all other domestic relationships. This historically unanimous preference for marriage would be called into question were this Court to hold that there exists either a fundamental right to engage in sodomy, or a constitutional equivalence between same-sex and opposite-sex unions.

Petitioners seek to effectively, though indirectly, undermine marriage by constitutionalizing a perceived social change: "Today, the prevalence and widespread acceptance of extramarital sex and birth control, accompanied by heightened respect for reproductive privacy, have rendered anachronistic the conception of marriage as a regulator of sex." Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089, 1089 (2002). This aim is inappropriate because of the unique constitutional status of marriage premised on its unparalleled contribution to society.

A vigorous public debate over the nature and definition of marriage is currently taking place in American homes, workplaces, places of worship, town halls, statehouses, and courtrooms. This marriage debate involves fundamental questions of social pluralism, limited government, and core world views. Petitioners seek to end that debate and

[3] In 2000, the Vermont Legislature enacted a "civil unions" law granting same-sex couples who register their civil union all the benefits of marriage. Vt. Stat. Ann., tit. 15, § 1201, et seq. (2002). Even under Vermont law, however, marriage remains the union of one man and one woman. Vt. Stat. Ann., tit. 15, § 8 (2002).

circumvent by judicial decree, the consensus-building process of legitimate, democratic self-government.

A. Marriage is the primary institution for regulating sexual behavior.

Marriage is the primary social institution for regulating sexual behavior. "All societies . . . control sexual behavior in some manner; the two most universal forms of control appear to be the incest taboo and marriage. . . . Sex outside of marriage, unlike sex before marriage, is *not* permitted in a majority of societies." Bert N. Adams, *The Family: A Sociological Interpretation* 188-89 (1986). The state strives to channel sexual behavior into marriage, for that is the relationship and bonding environment in which sexual love can most safely and responsibly be expressed. The primary means is by direct regulation of marriage, but supporting and reinforcing are a host of laws including criminal and civil laws that prohibit and regulate nonmarital sexual behavior. As two reknowned historians put it: "[S]ex is a river of fire that must be banked and cooled by a hundred restraints if it is not to consume in chaos both the individual and the group." Will Durant & Ariel Durant, *The Lessons of History* 35 - 36 (1968).

Marriage "strengthens the social interest in channeling and limiting procreative sexual behavior to responsible relationships of parental commitment and complementarity. More clearly than any other institution, traditional male-female marriage clearly links sexual behavior with child rearing through procreation. It provides a bright line for relationships of intimacy. It provides a clear, well-established, universally respected standard for allocating parental responsibility." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. L. & Pub. Pol'y 771, 794 (2001). Marriage, moreover, conforms to

powerful, intuitive social mores linking marriage, sexual relations, and procreation.

Society has compelling interests in protecting the social institution – marriage – that has best furthered social interests in responsible sexual behavior, and in preserving the linkage that institution forges among sex, procreation, and child rearing.

The social connection linking marriage and sexual behavior is as old as marriage itself. Plato proposed that "marriage laws [be] first laid down" and that "a penalty of fines and dishonor" be imposed upon all who did not marry by certain ages because "intercourse and partnership between married spouses [is] the original cause of childbirths." Plato, *The Laws of Plato* 108-109, 161 (Thomas L. Pangle trans., University of Chicago Press 1980). Similarly, concern about the linkage between marriage and responsible sexual behavior and procreation was one of the major purposes for marriage regulation in Roman law. Susan Treggiari, *Roman Marriage: Justi Coniuges From the Time of Cicero to the Time of Ulpian* 5-11 (1991). During the centuries following the Roman era, the primary intellectual justification for prioritizing marriage and marriage regulations has remained the fostering responsible sexual intercourse and reproduction. Locke linked "the increase of Mankind, and the continuation of the Species in the highest perfection," with "the security of the Marriage Bed, as necessary thereunto." John Locke, *Two Treatises of Government* 183 (Cambridge Univ. Press 1988) (1690).

The history of marriage law could be viewed primarily as the history of the regulation of sex, procreation, and child rearing, for those concerns have long outweighed such modern (and postmodern) interests as romantic love, companionate equality, interspousal intimacy, and economic maximization as the core societal concerns regarding marriage. *See generally* Will Durant, *The Reformation: A*

History of European Civilization from Wyclif to Calvin: 1300-1564 at 303 (1957) ("Love was considered a normal result, not a reasonable cause, of marriage."); Mary Ann Glendon, *The Transformation of Family Law passim* (1989); William J. Goode, *World Revolution and Family Patterns* 38 (1963); Lawrence Stone & Jeanne Stone, *An Open Elite? England 1540-1880* at 122 (1984); *Sex in the West,* The New Republic, July 8, 1985, at 25, 32.

Even today, channeling sexual behavior remains a primary purpose of marriage in our society. As one prominent American community puts it: "Marriage is the uniting of one man and one woman in covenant commitment for a lifetime. It is God's unique gift to reveal the union between Christ and His church, and to provide for the man and the woman in marriage the framework for intimate companionship, the channel for sexual expression according to biblical standards, and the means for procreation of the human race." *The Baptist Faith and Message* (revised by the Southern Baptist Convention, June 10, 1998) <http://www.sbcnet.org/bfm18.htm>.

B. This Court has extended constitutional significance to the institution of marriage as the primary institution to foster responsible sexual behavior.

This Court has long recognized a "right to marry." Although the existence of such a right was intimated as early as 1923 in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the first case to uphold the right to marry was *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, the Court overturned the criminal convictions of a couple who had violated Virginia's anti-miscegenation laws. Subsequent cases have reiterated the fundamental constitutional importance of marriage. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

In many cases, this Court has noted the social importance of the marriage relationship, on which rests its constitutional status. *Meister v. Moore*, 96 U.S. 76, 81 (1877); *Reynolds v. United States*, 98 U.S. 145, 165-166 (1878).

As this Court noted 118 years ago, states have a clear and legitimate right to promote marriage as an important state interest.

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

Nearly forty years ago, this Court noted that marriage is a social institution which predates even the creation of our Constitution and Bill of Rights:

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

Similarly, this Court has recognized the connections between procreation, the right to marry, and the regulation of nonmarital sexual activity.

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection and, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relationships legally to take place.

Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

As recently as 2001, this Court recognized the social value of marriage in upholding an immigration paternity rule which imposed a greater burden of proof on unwed fathers than on either married fathers or on mothers, *Nguyen v. I.N.S.*, 533 U.S. 53 (2001). *See also*, *United States v. Virginia*, 518 U.S. 515, 522 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946): "The two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.")

i. Marriage is the fundamental element of American democratic society.

As one commentator has noted, "Through the commitments of marriage and kinship both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine forms." Bruce

C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests* 81 Mich. L. Rev. 463, 476 (1983). He also notes that "Marriage alone plays a critical role in the democratic structure by interposing a significant legal entity between the individual and the State." *Id.* at 483.

Thus, the constitutional status of marriage and the marriage-based family, which is unique to those institutions, is justified by the singular benefit they confer on our political system. In recommending passage of the federal Defense of Marriage Act, The Report of the Committee on the Judiciary of the House of Representatives noted a recent report of the Council of Families in America which stated:

> The enormous importance of marriage for civilized society is perhaps best understood by looking comparatively at human civilizations throught history. Why is marriage the most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generating continuity.
>
> . . . .
>
> Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children.

Defense of Marriage Act, Rep. 104-664, Comm. on Judiciary, 104th Cong., 2d Sess., July 9, 1996, at 13-14.

ii. Marriage is the optimal setting for procreation and child rearing.

Similarly, the marriage-based family provides the ideal setting in which children may be both born and reared because, "the commitments inherent in formal families do

increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment." Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests* 81 Mich. L. Rev. 463, 475-476 (1983).

In the context of citizenship requirements, this Court has recognized as "important governmental objectives" (1) "assuring that a biological parent-child relationship exists" and (2) ensuring a potential for the development of "not just a relationship that is recognized as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent." *Nguyen v. I.N.S.*, 533 U.S. 53, 62 & 64 (2001).

These important interests are uniquely advanced by a preference for sexual relations within marriage because a child conceived as a result of the relationship between married parents is legally guaranteed some kind of relationship to both of his or her parents. A sexual relationship outside of marriage that results in conception of a child brings with it no such guarantee. A sexual relationship with no possibility of procreative potential is even farther removed from these interests.

C. Texas law endorses and affirmatively prefers sexual relations within marriage

The Texas legislature has recognized marriage as the only institution within which sexual activity is licensed and affirmatively endorsed. Tex. Fam. Code Ann. § 2.001(a) (West 2002). In 1973, the same year in which section 26.01 was enacted, the Legislature also adopted the precursor to

the current Texas Family Code § 2.001, providing that marriage licenses may be granted only to male-female unions. Acts 1973, 63rd Leg., p. 1596, ch. 577, § 1.

If the Texas Legislature believes, as this Court has indicated, that the male-female union of marriage is the foundation upon which social relations, social obligations and duties, and the principles of American government rest, it is fully reasonable for the Legislature to prefer marriage over same-sex unions. *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878). Moreover, because of the stability needed to provide a secure environment for children, and to minimize confusion in the ordering of economic unions, the Legislature also saw fit to prefer marriage over nonmarital opposite-sex unions.

Among the legal responsibilities of marriage is the duty of a married individual to provide support for his or her spouse. Texas Fam. Code Ann. § 2.501(a) (West 2002) establishes a legal duty between spouses for the mutual support of each other. Section 2.501(b) goes on to establish a married person's civil liability to third parties who provide necessaries to that person's spouse. Tex. Fam. Code Ann. § 2.501(b) (West 2002). Similarly, because Texas is a community property state, all property acquired by either spouse during the marriage is presumed to be community property, jointly held by each spouse in an undivided one-half interest. Tex. Fam. Code Ann. § 3.003 (West 2002).

Furthermore, a married person is subject to statutory limitations upon his or her ability to transfer property upon death or dissolution of the marriage. Upon dissolution, Texas law requires that the property of the spouses be equitably divided between them, taking into consideration the rights of each party and of any children of the marriage. Tex. Fam. Code Ann. § 7.001 (West 2002). Upon death, the deceased spouse may devise no more than one-half of his or her

community estate to a third party, as the surviving spouse maintains a one-half interest in the estate.

On the basis of this legal relationship, the Texas legislature has also assigned a number of legal benefits which recognize and promote the family relationship created through marriage. Among the intangible benefits recognized in Texas law are the right of spousal privilege and confidential communications, Rule 504, Tex. Rules of Evidence (2002), and the right to decide final disposition of a spouse's body, Tex. Health and Safety Code Ann. § 711.002 (West 2002).

Examples of more quantifiable benefits available under Texas law include health insurance benefits, *e.g.*, Tex. Ins. Code Ann. § 1551.004 (West 2002) (definition of covered dependents of state employees), Tex. Ins. Code Ann. § 1575.003 (West 2002) (definition of dependents of public school system employees); retirement and survivor benefits, *e.g.*, Tex. Gov't Code Ann. § 615.073 (West 2002) (public employee survivor health benefits), Tex. Rev. Civ. Stat. Ann. art. 6243a-1 (West 2002) (police and fire personnel pensions), Tex. Rev. Civ. Stat. Ann. art. 6243e (West 2002) (local fire fighters retirement act); workers compensation benefits, Tex. Lab. Code Ann. §§ 408.182-.183 (West 2002), wrongful death benefits, Tex. Civ. Prac. & Rem. Code Ann. § 71.004 (West 2002), intestacy rights, Tex. Prob. Code Ann. § 45 (West 2002), presumptive right of community interest in property held at dissolution, Tex. Fam. Code Ann. § 3.003 (West 2002), and the right of spousal support, Tex. Fam. Code Ann. § 2.501(a) (West 2002).

Overall, 1429 provisions of the Texas Code contain the words "marriage," "spouse," "husband," or "wife." Though not all of these statutory sections confer actual benefits or responsibilities upon married couples, the volume of references to marriage and married relationships indicates the central role which marriage plays in Texas law.

In contrast, the Texas legislature extends no formal recognition of unmarried domestic partnerships as a family status or legal relative. Rather, the legislature has clearly articulated that "[a] member of a civil union or similar relationship entered into in another state between persons of the same sex is not a spouse." Tex. Fam. Code Ann. § 3.401(5) (West 2002). Similarly, title 8 of the Texas Government Code, governing public retirement systems, states:

> For purposes of this title, the state may not give effect to a: (1) public act, record, or judicial proceeding that recognizes or validates a marriage or civil union between persons of the same sex; or (2) right or claim asserted as a result of the purported marriage or civil union.

Tex. Gov't Code Ann. § 810.001(h) (West 2002).

All four sections of Texas code containing the phrase "domestic partnership" refer to a business relationship under the Texas Revised Limited Partnership Act and the Texas Revised Partnership Act. Tex. Rev. Civ. Stat. Ann. art. 6132a-1 (West 2002); Tex. Rev. Civ. Stat. Ann. art. 6132b-9.02 (West 2002); Tex. Rev. Civ. Stat. Ann. art. 6132b-9.03 (West 2002); Tex. Rev. Civ. Stat. Ann. art. 6132b-9.05 (West 2002).

D. Section 21.06 is part of an incremental system channeling sexual activity into marriage and minimizing sexual activity outside of marriage.

Not only has the Texas legislature adopted a system of laws to strengthen and preserve marital unions, but the Legislature has also adopted an incremental statutory system which expresses its preference for marriage as the relationship within which sexual activity is to exist. This system may be viewed as an effort to draw Texas couples

into the institution of marriage wherever possible, while at the same time discouraging and/or prohibiting sexual conduct outside of marriage.

While Petitioners present section 21.06 as a law unique in its application and scope, singling out a particular class of people, the Texas legislature has sought to discourage all unmarried sexual relationships. Texas Education Code § 28.004 requires that Texas schools teach abstinence as the preferred mode of conduct for unmarried students, urging students to practice "abstinence from sexual activity before marriage." Tex. Educ. Code Ann. § 28.004 (West 2002). Notably, the state policy discouraging sexual activity among students is clearly couched in the context of marriage. Similarly, in teaching students how to avoid HIV infection, schools are to teach students "the value of abstinence and long-term mutual monogamy." Tex. Educ. Code Ann. § 51.919 (West 2002).

In the Texas Public Health Code, materials used in teaching minors are to "emphasize sexual abstinence before marriage and fidelity in marriage as the expected standard in terms of public health." Tex. Health & Safety Code Ann. §85.007(b)(1) (West 2002). The Legislature proceeded to state that "abstinence from sexual intercourse outside of lawful marriage is the expected societal standard for school-age unmarried persons." Tex. Health & Safety Code Ann. § 163.001 (West 2002).

Texas law expresses its disapproval of all non-procreative sexual conduct by maintaining a general definition of "deviate sexual intercourse." Tex. Penal Code Ann. § 21.01(1) (West 2002). Thus, sexual activity involving objects, the mouth, or the anus is uniformly classified as "deviate" under Texas law. A dictionary definition of "deviate" suggests that "deviate" conduct is that which "departure from an accepted norm." *Random House Webster's College Dictionary* 370 (1991), Thus, all "deviate

sexual conduct" is a departure from the accepted norm in Texas, whether between two persons of the same sex or two persons of the opposite sex. These and other sections of Texas law make it clear that the Legislature disapproves both of "deviate sexual conduct," and of all sexual conduct between unmarried persons.

Obviously, classroom disapproval of extramarital sexual activity is distinct from a criminal prohibition of deviate sexual conduct between persons of the same sex. Such a distinction, however, need not be considered an arbitrary and capricious attack on a class of "homosexuals" as Petitioners suggest. *See, e.g.*,Pet. Brief at 45 (describing section 21.06 as part of a history of "irrational anti-gay discrimination.").

Criminal prohibitions of or disincentives for nonmarital sexual relations are part of the scheme of laws supporting marriage. The constitutional significance of the distinction between marital sex and nonmarital sex was eloquently explained by Justice Harlan in his prophetic dissent in *Poe v. Ullman*, 367 U.S. 497, 522, 552-553 (1961). After explaining the critical importance of marriage and of marital privacy, he noted that even the family could be regulated in some respects, including regulation of some sexual behavior by laws forbidding adultery and incest, for example, but that to attempt to regulate marital sex would intrude upon the constitutionally protected realm of marital (family) privacy. That distinguished regulation of marital intimacy from regulation of nonmarital sexual behavior.

> "(T)he family * * * is not beyond regulation," Prince v. Commonwealth of Massachusetts, [321 U.S. 158, 166 (1944)], and *it would be an absurdity to suggest* either that offenses may not be committed in the bosom of the family or *that the home can be made a sanctuary for crime.* The right of privacy most manifestly is not an absolute. Thus, *I would not suggest that adultery, homosexuality,*

> *fornication and incest are immune from criminal enquiry, however privately practiced.* So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. [ ] 367 U.S. at 545-548 [] But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.
>
> In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.
>
> *Poe v. Ullman*, 367 U.S. 497, 522, 552-553 (1961).

In this assessment, Justice Harlan reflected a moral sense deeply rooted not only in the history of western civilization, but also deeply rooted in the history of this Nation. From the time of Thomas Jefferson, homosexual sodomy has been proscribed to protect marriage. A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital in The Papers of Thomas Jefferson, Vol. 2, 1777 to 18 June 1779, at 492, 493, 497 note † (Julian P. Boyd ed., Princeton Univ. Press 1950).

E. In failing to distinguish between married and unmarried couples, Petitioners would have this court require equal legal recognition of same-sex couples and married couples.

Petitioners argue that Section 21.06, and indeed all state prohibitions of sodomy, are products of invidious discrimination against gay and lesbian persons, intended solely to express "negative attitudes" toward such people. Pet. Brief at 39. Phrased in a positive light, Petitioners' argument suggests that a government must express the same approval for same-sex unions as it extends to opposite-sex unions. Thus, by extension of Petitioners' argument, any law precluding same-sex couples from marriage or other family relations is a product of that same individious discrimination.

Indeed, this is precisely what plaintiffs have argued in cases across the country seeking to invalidate the marriage laws of various states. As the plaintiffs in the Massachusetts marriage litigation argued, "If the concept of being gay or lesbian means anything, it includes those who wish to share their most intimate relationship with a partner of the same gender. Unlike rules preventing consanguineous or under-age marriages which operate evenly across the population and apply to everyone, rules preventing individuals from marrying others of the same sex operate systematically to exclude the class of gay men and lesbians." Brief of

Plaintiffs-Appellants, *Goodridge v. Dept. of Public Health*, at 61, No. SJC-08860 (Mass.). Similarly, the Plaintiffs challenging New Jersey's marriage law seek to have the law invalidated on equal protection grounds under the state constitution, arguing that the state unfairly discriminates against gay and lesbian persons by denying them the right to marry a person of the same sex. Complaint, *Lewis v. Harris* at para. 66-67, No. 15-03, Mercer Co. Super. Ct. (N.J.). Plaintiffs in Indiana have argued that same-sex "marriage" is required under the equal privileges guarantee of the Indiana Constitution. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 34, *Morrison v. Sadler*, Docket # 49D13-0211-PL-001946, Marion Super. Ct. (Ind.).

F. Numerous state and federal laws could be impacted by the Court's decision in this case, removing an important public policy debate from the political process

Every state in the United States legally recognizes the social contributions of marriage.[4] In recent years, 36 states have explicitly reaffirmed marriage as a male-female union, highlighting the legal distinction between same-sex and opposite-sex couples.[5] This action in turn relies in part on the

---

[4] Even in those states in which the marriage statute does not explicitly declare marriage to be a male-female union, courts have uniformly interpreted the law in this manner. *See, e.g., Baker v. Nelson,* 191 N.W.2d 185, 185 (Minn. 1971); *Singer v. Hara,* 522 P.2d 1187, 1189 (Wash. Ct. App. 1974); *Baker v. State*, 744 A.2d 864, 869 (Vt. 1999).

[5] Ala. Code § 30-1-19 (2002); Alaska Const. art. I, § 25; Ariz. Rev. Stat. Ann. § 25-101 (West 2000); Ark. Code Ann. § 9-11-107 (2002); Ark. Code Ann. § 9-11-109 (2002); Ark. Code Ann. § 9-11-208 (2002); Cal. Fam. Code § 308.5 (West 2002); Colo. Rev. Stat. § 14-2-104 (2002); Del. Code Ann. tit. 13, § 101 (2001); Fla Stat. Ann. § 741.212 (West 2000); Ga. Code 19-3-3.1 (2002); Haw. Rev. Stat. § 572-3 (1999); Haw. Const. art. I, § 23; Idaho Code § 32-209 (2002); 750 Ill. Comp. Stat. Ann. § 5/212 (West 2000); Ind. Code § 31-11- 1-1 (2002); Ia. St. 595.2 (2002); Kan. Stat. Ann. § 23-101 (1999); Ky. Rev. Stat. Ann. §§

federal Defense of Marriage Act (DOMA) enacted overwhelmingly by Congress in 1996 and signed into law by President Clinton. Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997).

In addition, myriad laws from across the United States rest upon this definition of marriage. In the classroom, state and federal laws require that students be taught abstinence outside and fidelity within the male-female union of marriage.[6] State adoption laws recognize marriage as the basis for joint adoptions[7] and step-parent adoptions.[8] Tax laws are constructed to recognize the unity of the marital relationship, permitting joint filing by husband and wife.[9] A

402.040, 404.045 (Michie 2002); La. Civ. C. art. 89 (West 2000), amended by 1999 La. Act of July 2, 1999, No. 890 § 1; Me. Rev. Stat. Ann. tit. 19-A, § 701 (West 2002); Mich. Comp. Laws Ann. § 551.1 (West 2000); Mich. Comp. Laws Ann. § 551.271 (West 2000); Minn. Stat. Ann. § 517.01 (2002); Miss. Code Ann. § 93-1-1 (2002); Mo. Rev. Stat. § 451.022 (West 2002); Mont. Code Ann. § 40-1-401 (2002); Neb. Const. art. I, § 29; Nev. Question 2 (approved Nov. 5, 2002); N.C. Gen. Stat. § 51-1.2 (West 2000); N.D. Cent. Code § 14-03-01 (1960); 43 Okla. St. Ann. § 3.1 (West 2000); Pa. Consol. Stat.Ann. § 1704 (West 2000); S.C. Code Ann. § 20-1-15 (West 2000); S.D. Cod. Laws § 25-1-1 (2000); Tenn. Code Ann. § 36-3-113 (2002); Utah Code Ann. § 30-1-4 (2000); Va. Code § 20-45.2 (West 2000); Wash. Rev. Code Ann. § 26.04.020 (West 2000); W.Va. Code § 48-2-603 (2002).

[6] *See* 42 U.S.C. § 710 (2002) (providing grants to states for "abstinence education" including instruction in "the social, psychological and health gains to be realized by abstaining from sexual activity" and the normative role of abstinence outside of marriage and faithful monogamy within marriage.).

[7] *See* Ala. Stat. § 26-10A-5 (2002); Ariz. Rev. Stat. § 8-103 (2002); 13 Del. Code § 951 (2002); Fl. Stat. § 63.042 (2002); Ia. Stat. § 600.4 (2002); 750 Ill. Comp. Stat. § 50/2 (2002); Kan. Stat. § 59-2113 (2002); 18-A Maine Rev. Stat. § 9-301 (2002); Mt. Code Ann. 42-1-106 (2002); 10 Ok. Stat. §7503-1.1; Wis. Stat. § 48.82 (2002).

[8] *See* Ala. Stat. § 26-10A-27 (2002); Cal. Fam. Code App. § 227.10 (2002); Ga. St. § 19-8-3(c) (2002); ; Iowa. Code § 600.4 (2002); Mt. Code Ann. § 42-4-302 (2002); N.M. Stat. § 32A-5-32 (2002); N.C. Stat. § 48-4-101 (2002); Vt. Stat. Ann. tit. 15A, § 4-101 (2002).

[9] *See, e.g.*, 26 U.S.C. § 6013 (2002).

recent study conducted by the Office of Legislative Research in Connecticut identified 588 laws which distinguish on the basis of marriage or marital status. Susan Price-Livingston, *Connecticut Laws Involving Marital Status*, OLR Research Report #2001-R-0606 (Feb. 5, 2002) (Conn.). These results are comparable to less definitive research done in other states.

"The word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times." Defense of Marriage Act, Rep. 104-664, Comm. on Judiciary, 104th Cong., 2d Sess., July 9, 1996, at 10. Congress was wise enough to exercise its power under Article IV, Section I of the Constitution to repudiate an effort to force states to legalize same-sex marriage by distortion of the Full Faith and Credit Clause. Defense of Marriage Act, Pub. L. 104-199, September 21, 1996, 110 Stat 2419 (Sept. 21, 1996). This Court should repudiate the effort to force states to legalize same-sex marriage through a distortion of the Equal Protection and Due Process Clauses.

G. Deference to the Texas Legislature would preserve the important principle of federalism in family laws.

The regulation of domestic relations, including the definition and regulation of marriage, has long been considered to fall almost entirely to the states. "From the earliest days of the Republic until the recent past, family law has unquestionably belonged to the states." Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1821 (1995). The federal government has no constitutional authority to directly regulate marriage or divorce or other family relations and institutions. This Court has observed, not infrequently, that the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually

exclusive province of the states." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). Thus, the direct and indirect regulation and enforcement of family law is left primarily to state courts, and the governing rules are state, not federal, laws.

Federalism's deference to state regulation of family relations has a constitutional foundation. Substantively, the powers of the federal government are limited to those specifically enumerated in the Constitution, and since the power to regulate family relations is not so enumerated that power is deemed reserved to the States. *See* U.S. Constitution, Amendment X; Lynn D. Wardle, *Institutionalizing Marriage Reform Through Federalism* in Revitalizing the Institution of Marriage for the Twenty First Century (2002).

In the Federalist Papers, No. 10 James Madisons famously declared: "The federal Constitution forms a happy combination . . . ; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." The Federalist No. 45, at 83 (James Madison) (Clinton Rossiter ed., 1961). He again explained::

> The powers delegated by the proposed constitution to the federal government are few and defined. Those that remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State.

Id. at 292-93.

Hamilton suggested in Federalist No. 17 that the national government would be concerned with matters of "[c]ommerce, finance, negotiation, and war" while the States governments would have priority in regulation "[t]he administration of private justice between citizens of the same State, the supervision of agriculture and of other concerns of a similar nature," and "regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . ." Id. at 118-120. He also noted: "[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty." Id. at 290.

Since 1789 the broad, general authority of the states to regulate family relations, and the absence of virtually any authority of the federal government to directly regulate family relations has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law still remains, primarily a matter of state law.

In several notable recent decisions, this Court has applied the federalist principle to invalidate as unconstitutional laws enacted by Congress that went beyond the limited powers delegated to Congress. *See, e.g., United States v. Morrison*, 529 U.S. 598, 607, 615-16 (2000). Marriage has been a particular area of deference to state regulation. This Court has reiterated its declaration first made in 1878, that "[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878). While the exact contours of constitutional federalism are not clear, "[t]hroughout the debate on federalism, family law emerges as the one clear case in which federal involvement is inappropriate, an uncontested core rendered special precisely

because almost everything else has been nationalized and the limits on federal power elsewhere are so murky." Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297, 1297-98 (1998).

Behind these federalism practices are many strong and important policy values. Thus, federalism in family law is not a mere anachronism but is a doctrine based upon significant perceptions of the realities associated with the government of a large, heterogenous nation. These underlying policy values include pluralism, communitarianism, experimentation, and respect for state expertise and sovereignty. Federalism in family law preserves pluralism by guaranteeing at least fifty different zones for family policy development. By insisting that marriage be regulated a local (state) rather than national level, the vitality of small communities - who would be drowned out in policy debates at the national level but who may have some significant voice in state politics - is enhanced. Federalism in family law reflects the long-held belief that laws regulating families should reflect local values because those are such sensitive, delicate matters that any attempt to regulate them at the national level would guarantee neglecting the interests of minority communities. Charles Louis de Secondat (Baron de Montesquieu), The Spirit of the Laws, Book XIX, ch. 14, and at Book XIX, ch. 5 (T. Nugent trans., 1902). Federalism allows the states to experiment with different policies, rules and procedures in a way that functions as fifty separate laboratories. As Justice Brandeis wrote famously: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Federalism in family law entails respect for the expertise of state lawmakers, who have

been enacting and revising family laws since the time of the American colonies.

III. THE APPROPRIATE CONSTITUTIONAL RESPONSE TO THIS CASE IS FOR THIS COURT TO DEFER TO THE TEXAS LEGISLATURE.

A. Deferring to the Texas Legislature would not conflict with this Court's holding in Romer v. Evans

Petitioners argue that section 21.06 conflicts with this Court's holding in *Romer* v. *Evans*, 517 U.S. 620 (1996), because it is based solely upon "animus" toward homosexuals, rather than any legitimate state interest. This argument misunderstands the holding in *Romer*.

The Supreme Court's opinion in *Romer* was a very narrow one that applies only to laws, such as Colorado's Amendment 2, that prohibit *all* levels of government from protecting a *particular* class of citizens against *any* kind of discrimination. The constitutional flaw in Colorado's Amendment 2 was its extreme overbreadth, not the identity of the group it adversely affected. The majority in *Romer* applied the lowest standard of review -- the rational basis test -- and found that no legitimate purpose reasonably fit the infinitely broad sweep of the disability imposed by the Amendment. *Id.* at 635.

The law struck down in *Romer* was a constitutional amendment that prohibited all levels of state and local government from enacting any law or policy providing homosexuals any "protected status or claim of discrimination." *Id.* at 624. The extreme breadth of this provision made it possible to imagine instances in which Amendment 2 would bar policies designed to protect homosexuals from harms that everyone would acknowledge

to be wrongful. The opinion in *Romer* concluded that the "unprecedented" evil of Amendment 2 was that it identified persons by "a single trait" and then "denie[d] them protection across the board." *Romer*, 517 U.S. at 633. The Amendment imposed "a broad and undifferentiated disability on a single named group" by denying "specific protection" against "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631-632. Homosexuals were placed completely outside the protection of the law and could "obtain specific protection against discrimination only by enlisting the citizenry of Colorado." *Id.* at 631. As a result, a review of lower court decisions relying on *Romer* indicate that the impact of the opinion has been extremely narrow. *See* William C. Duncan, *The Legacy of* Romer v. Evans–*So Far* 10 WIDENER J. PUB. L. 161 (2001).

The Texas law under attack here is not a status-based law that fences out a particular group from protection against any and all discriminatory wrongs. [10] As the Court explicitly stated in *Romer*, ordinary laws will be "sustained" so long as they are "narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it serve[s]." Id. at 632-633.

Unlike Colorado Amendment 2, the Texas law focuses on a narrow and specific issue and does not impose an across-the-board disability on a particular named group. It does not target a class of persons defined by status and deny that class the opportunity to protect itself politically against a limitless number of discriminatory harms and exclusions.

[10] In addition to the factual defects noted in Section I, supra, there is no indication in the facts of this case that Petitioners would even identify themselves as homosexuals, undermining even their standing to claim that the law discriminates on the basis of their sexual orientation. Pet. Br. at 32, n.24.

The law does not forbid any individual or group from seeking political protection against any kind of public or private discrimination. Indeed, anyone who desire to engage in sodomy is free to use the political process to change the law that offends them.

If the object of this case were really to invalidate the Texas sodomy law an argument based on desuetude would seem more fitting than a constitutional argument. "Criminal prosecution for sodomy is rare." Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813, 813 (2001), and usually occurs when exceptional circumstances (such as flaunting behavior or solicitation in public places, commercial sex, threat to children, etc.) are present. "Sodomy laws are not generally enforced per se--few individuals are prosecuted specifically for acts of consensual sodomy."[11]

In *Maynard v. Hill*, 125 U.S. 190 (1888), this Court noted that, "Marriage, as creating the most important relation in life, as having more do to with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." *Id.* at 205. Whatever this Court does, it should recognize that promoting marriage is, as this Court has continuously recognized, a valid and important governmental interest. As such, State legislatures should be able to enact legislation, otherwise constitutional, that promotes this interest.

Like the law of all states, and reflecting the decisions of this Court, Texas law extends licensure and affirmative

[11] *Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982) . *See* Richard D. Mohr, Gays/Justice: A Study of Ethics, Society, and Law 51 (1988) ('[S]odomy laws are virtually never enforced.'); Richard A. Posner, Sex and Reason 4, 292 (1992) (noting that sodomy laws are 'dead letters'); Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. Rev. 737, 767 n. 142 (2000).

recognition of the sexual relationship within marriage. Tex. Fam. Code Ann. § 2.001(a) (West 2002). Ignoring the role of marriage, Petitioners have attempted to isolate section 21.06 from its place within the larger scheme of Texas statutes. *See, e.g.*, Pet. Brief at 36 ("[The state has] decided to single out same-sex couples for intrusive regulation and condemnation."). Viewed differently, however, section 21.06 may be viewed as part of an incremental system adopted by the Texas legislature to channel human sexuality into a stable and monogamous marital relationship. Even if the statutory scheme does not perfectly conform to that goal, it can be seen as a rational effort toward that legitimate end. The state need not negate every possible irrational explanation for the statute, but simply put forward a single interest to which the statute is rationally related. *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) ("Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end. The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review." (internal citations omitted)). Moreover, as Justice Holmes noted, in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922): "If a thing has been has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

B. Deference to the Texas Legislature Recognizes the Importance of Open Public Debate in Democratic Society

As Petitioners note, many states have repealed their sodomy laws in recent years, either through legislative or judicial pronouncement. Such developments are testimony to the ongoing public debate which is currently underway in American states. This type of public debate over controversial social issues is a hallmark of American representative government. As Constitutional rights and

liberties are currently construed, individuals on all sides of the debate may participate in the legislative process and help to shape the understanding of morality and proper regulation of sexual activity.

The legislature is the proper arena in which to shape state public policy. Only in egregious cases should this Court step in to rewrite state laws. Judicial intervention in this case would remove this important policy issue from the democratic process, effectively terminating the public debate. As this Court held in *Romer*, a constitution should not be used to deprive a distinct group of people – even a minority – of their voice in the political process.

Neither does the fact that other states have repealed their sodomy laws create a constitutional mandate that Texas repeal section 21.06. Due Process and Equal Protection jurisprudence, unlike this Court's recent holding in Eighth Amendment jurisprudence, are not dependent upon popular approval, nor do they evolve at some intangible tipping point, requiring unanimity wherever there exists a majority. *Cf. Washington v. Glucksberg* 521 U.S. 702, 721 (1997) (rooting substantive due process analysis in the "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition." (citations omitted)); *Atkins v. Virginia*, 536 U.S. 304, 122 Sup.Ct. 2242, 2249 (2002) (holding that the change in sister state policy regarding execution of mentally retarded persons made such executions "unusual" and thus constitutionally repugnant).This Court should not spend its rare coin of public credibility in a quixotic gesture to speed up or circumvent the ongoing process of democracy. The needs of the national government and the business of the Court are not so lacking nor are the processes of reform in the States so frozen that this Court should assume the lead in the political process of establishing a national policy on sexual or marriage regulation.

CONCLUSION

For the reasons stated above, Petitioners' writ of certiorari should be dismissed as improvidently granted. In the alternative, this Court should affirm section 21.06 in deference to the Texas Legislature's rightful jurisdiction to regulate marriage and familial relations.

Respectfully submitted,

VINCENT P. MCCARTHY
Counsel of Record
CENTER FOR MARRIAGE LAW
P.O. Box 1839
New Milford, Ct. 06776
(860) 355-1902

JOSHUA K. BAKER
MARRIAGE LAW PROJECT
Columbus School of Law
The Catholic University of America
3600 John McCormack Rd.
Washington, DC 20064
(202) 319-6755

LYNN D. WARDLE
WILLIAM C. DUNCAN
BRIGHAM YOUNG UNIVERSITY
518 J. Reuben Clark Law School
Provo, UT 84602
(801) 422-2617